U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of:

DATE: March 1, 2001

RUDY RODRIGUEZ,

Claimant,

CASE No. 1999-LHC-2076

vs.

METROPOLITAN STEVEDORE COMPANY, OWCP No. 13-88197

Permissibly Self-Insured Employer.

Appearances:

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For Claimant Rudy Rodriguez

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For Metropolitan Stevedore Company

Before: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER GRANTING MODIFICATION

On January 27, 1999, Employer Metropolitan Stevedore Company ("Employer") filed a Petition for Modification pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, ("the

Act"), 33 U.S.C. § 901 *et seq.*, seeking modification of the October 19, 1994 compensation order issued by the Office of Workers' Compensation Programs ("OWCP"). A formal hearing was held in San Francisco, California, on August 14, 2000. At the hearing, Claimant Rudy Rodriguez ("Claimant") and Employer were represented by counsel. There was no appearance on behalf of the Director, OWCP ("Director"). The following exhibits were admitted into evidence during the hearing: Administrative Law Judge Exhibits 1 and 2, ("ALJX-1" and "ALJX-2"),[1] Claimant's Exhibits ("CX") 1 through 7 (Tr.6) and Employer's Exhibits ("EX") 1 through 8. Tr.7. The parties called witnesses, offered documentary evidence and submitted oral arguments. The Court took the matter under submission and invited post-trial briefs, which were also made part of the record. ALJX-3;[2] ALJX-4.[3]

Employer requests Section 22 modification based on: (1) a change in Claimant's physical condition; and (2) improvements in Claimant's pre-injury employment which makes the position suitable for Claimant's physical capabilities.

Claimant argues that Section 22 modification is not appropriate because the parties had previously stipulated that Claimant was permanently and partially disabled from returning to his pre-injury employment. In the alternative, Claimant argues that there has not been an improvement in his physical condition.

For the reasons stated below, the undersigned finds that Claimant is no longer disabled.

BACKGROUND

Claimant filed a claim for benefits under the Act as a result of alleged injuries to his left shoulder, hand, neck, and low back that occurred on February 20, 1991, while he was working for Employer. On October 19, 1994, the Director approved the parties' stipulations and issued a compensation award. The stipulations established the extent of Claimant's injuries, the level of impairment, average weekly wage at the time of the subject injury and retained earning capacity. See EX-1.

Employer obtained surveillance videos of Claimant engaging in various physical activities from May 29, 1998 through December 10, 1998. (EX-8), and had Claimant evaluated by Dr. Joseph Bernstein on June 7, 1999. Employer filed a Petition for Modification on January 27, 1999, arguing that Claimant's medical condition has resolved so that he is medically able to return to his pre-injury employment. Employer relies primarily on the opinion of Dr. Bernstein, as well as the opinion of its vocational expert, Mr. Howard Stauber. Claimant relies on the testimony of his treating physician, Dr. Alan Zacharia, that

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[1] Administrative Law Judge Exhibits were Employer's Pre-Trial Statement ("ALJX-1") and Claimant's Pre-Trial Statement ("ALJX-2"). See Transcript, (Tr.) at 7.

[2] ALJX-3 - Employer's Post-Trial Brief.

[3] ALJX-4 - Claimant's Post-Trial Brief.

Claimant's condition has not improved since the 1994 stipulations, and he continues to be permanently disabled from returning to his pre-injury employment.

STIPULATIONS

1. A stipulated award was approved by the Director on October 19, 1994, which contains all stipulations between the parties. EX-1.[4]

2. Employer's Exhibit 7 (investigative logs) and Exhibit 8 (surveillance tapes) would be admitted into evidence without the foundational requirements of the investigator's testimony.

3. The Court will view the surveillance tapes after the hearing. Tr.8.

ISSUES IN DISPUTE

1. Is Claimant able to return to his pre-injury employment?

2. Should Employer's Petition for Modification be granted?

SUMMARY OF EVIDENCE

Claimant's Background and Testimony

Claimant Rudy Rodriguez ("Claimant") was born on September 26, 1942, and at the time of this hearing was fifty-seven years of age. Claimant worked approximately twenty-seven years on the waterfront. Tr.13. He testified that he primarily worked as a winch driver; however his injury occurred while he was working as a tractor driver. On February 20, 1991, Claimant sustained injuries to his lower

[4] The parties stipulated to the following: 1) Claimant was permanently and partially disabled as a result of his industrial injury; 2) Claimant's average weekly wage was $918.77, yielding a temporary total compensation rate of $612.51; 3) Claimant sustained injuries to his left shoulder, neck, left hand, and low back on February 20, 1991; 4) Claimant's condition reached maximum medical improvement on April 17, 1992. He was precluded from repetitive bending, carrying or lifting and all heavy lifting, but is able to work 40 hours a week within these restrictions if he can alternate between sitting and standing; 5) Claimant's neck condition did not preclude his return to his pre-injury employment; and 6) Claimant's residual wage-earning capacity was $6.00 per hour. See EX-1.

back, neck, left shoulder, left hand and left knee when the tractor he was driving came to a sudden stop causing Claimant to be thrown forward in the cab of the vehicle. Tr.51. He has not worked since the day of the subject injury. Tr.13. On October 19, 1994, the Director, OWCP, issued a compensation order in which Claimant was found to be permanently and partially disabled from returning to his pre-injury employment. EX-1.

At trial, Claimant testified that since the 1994 stipulations his back condition has grown more debilitating as he now experiences back pain on both sides. Tr.20. Claimant described this pain as a sharp pain radiating down his buttocks and to both lower extremities. Claimant indicated that Dr. Zacharia was his treating physician; however he did not recall that he had only seen Dr. Zacharia on one occasion between July 1994 and June 1998. Tr.22. Claimant did not feel that he had a good rapport with Dr. Zacharia due to the length of time Claimant waited during his appointments. Tr.23. Claimant denied telling Dr. Zacharia that activities such as climbing ladders and sawing aggravated his back. Tr.25. Claimant reported that he was experiencing headaches as a result of his neck condition, but has not received any treatment for this condition. Tr.29.

Claimant testified that he discussed the surveillance videos with Dr. Zacharia. He remarked that the videos did not accurately depict the situation; they did not show when Claimant had to take breaks or was rubbing his back. Tr.33. When asked why his twenty-five year old son could not have performed some of the tasks Claimant was observed doing on the tapes, Claimant stated that his son had broken his hand, finger or fingers; however he could not remember exactly when this injury occurred. Tr.41.

Claimant also stated that he could not return to his pre-injury employment because he could not withstand the bouncing, bending and twisting of the position. Tr.34. He further noted that he could not handle the climbing and twisting associated with entering and exiting the cab. Tr.36. Claimant stated that during a typical hour-long shift he would have to get out of the cab every ten minutes. Tr.38. He conceded that he would be allowed to get out of his cab while waiting in line for a container. Tr.74. Claimant also admitted that he has not returned to the terminals since 1994. Tr.72.

On re-cross examination, Claimant testified that he was still experiencing problems with his lower back, left shoulder and neck. Tr.52. Claimant stated that his pre-injury work involved a chassis vehicle or bomb cart vehicle. The former entails a crane placing a container into the chassis of the tractor. He noted that the jarring from this procedure could "knock your fillings loose." Tr.58. Claimant also indicated that he "didn't like the job" and "tried to avoid the tractor job as much as possible . . . ." Tr.85.

In addition to his orthopedic condition, Claimant testified that he has undergone five cardiac procedures, including a stress echo test conducted approximately a week before trial. Tr.68. In 1997,

Claimant was diagnosed with diabetes which he controls through his diet. Tr.69.

Dr. James Stark

On behalf of Employer, Dr. James Stark conducted four examinations of Claimant on June 11, 1991, August 26, 1991, November 4, 1991 and August 24, 1992. The initial evaluation revealed: cervical strain with heightened muscle tension, but normal range of motion; extension of the spine limited to 20 degrees by pain and increased pain with lateral extension in each direction; no release reflexes; lower extremity neurological examination within normal limits. Claimant reported constant neck pain, occasional mid-back pain, constant lower back pain which is greater on the left side, and numbness and weakness in both lower extremities. CX-6, pp.91, 95-96. Dr. Stark noted that Claimant's past medical history included hypertension treated with the anti-hypertensive medication, Niacin. CX-6, p.92. Upon examination and review of Claimant's medical records, Dr. Stark concluded that Claimant's cervical and lumbar strains should not preclude Claimant from returning to work within a few weeks; however Claimant would have some difficulties with bending, carrying and lifting. CX-6, p.98. He further opined that since the lower back symptoms from the subject injury were quite similar to the ones present in 1986, the subject injury was a temporary aggravation of Claimant's pre-existing lower back condition.

In his August 26, 1991 report, Dr. Stark noted that Claimant's lumbar spine MRI[5] in 1986 revealed degenerative changes at L5-S1, including diffuse bulging without herniation. CX-6, p.100. He confirmed his previous opinion that Claimant would be able to return to his pre-injury employment, but that Claimant would remain symptomatic at the lumbar spine level as a result of his pre-existing condition and history of spine pain. CX-6, p.101.

Dr. Stark's November 5, 1991 progress notes state that Claimant's September 1991 MRI revealed degenerative disc disease at L4-5 and L5-S1; a small disc protrusion on the left side; some foraminal stenosis; mild disc bulge at L4-5. CX-6, p.102.

On August 24, 1992, Dr. Stark re-examined Claimant, at which time Claimant reported variable intensity of lower back pain radiating to his left buttock, and left leg numbness. See Report of Dr. James Stark, December 8, 1992 ("Dr. Stark's 1992 Recommendations"), CX-6, p.104. Dr. Stark declared that Claimant's condition had not improved since the November 1991 examination; that Claimant remained limited in his tolerance for sitting, bending and lifting. Dr. Stark provided the following recommendations:

[5] "MRI" - magnetic resonance imaging.

> [Claimant] should be precluded from repetitive bending, repetitive light lifting, all heavy lifting, repetitive carrying or heavy carrying. He is not capable of performing the usual work activities of a Longshoreman. However, [Claimant] is capable of working 40 hours per week at a job not requiring bending, lifting, carrying, pushing or pulling, or similar type straining activities. Future work activities should allow him to mix sitting and standing.

CX-6, p.107.

Dr. Alan Zacharia

On behalf of Claimant, Dr. Alan Zacharia, a board-certified orthopedic surgeon since 1979 and Claimant's treating doctor, testified at the hearing. Dr. Zacharia first treated Claimant in 1986 for an injury in which Claimant fell off a ladder while working on a ship. Tr.163. With respect to the 1991 industrial injury, Dr. Zacharia examined Claimant on March 7, 1991; he diagnosed herniated disc at L5-S1, degenerative disc disease, left canal stenosis and bilateral facet disease at L4-5. Tr.168. He further noted Claimant's subjective symptoms of left low back pain radiating into the left buttock and slight left thigh pain. Tr.167. Dr. Zacharia also referred Claimant for an MRI study, which was not conducted until September 25, 1991 due to the delay in receiving authorization from the insurance carrier. EX-2, p.50. Based on his review of the MRI films, Dr. Zacharia reported: left L5-S1 herniated disc with some foraminal encroachment; degenerative disc disease; left-sided canal stenosis at L5-S1; bilateral facet disease at L4-5. See May 19, 1992 Report of Dr. Alan Zacharia, EX-2, p.28. At trial, Dr. Zacharia affirmed these findings as his current diagnosis of Claimant's low back condition. Tr.167. He stated that he last proposed a diskectomy for Claimant's low back in 1993, but no longer recommended surgery for Claimant's condition. Tr.168.

In his May 1992 report, Dr. Zacharia reported degenerative disc and herniation at L5-S1, and chronic recurrent cervical strain. He concluded that Claimant was unable to return to his usual and customary employment as a dock worker as his condition could no longer tolerate the twisting, bending and lifting requirements of this position. CX-2, p.29. Dr. Zacharia declared Claimant's condition permanent and stationary on April 17, 1992. CX-2, p.29.

In his July 28, 1993 Supplemental Narrative Report, Dr. Zacharia indicated that Claimant's condition had not changed since the May 1992 report. However, he noted that Claimant's neck and back symptoms were aggravated while in vocational rehabilitation, and that Claimant reported low back pain radiating to both groins and transient right-sided pain during his June 18, 1993 visit. CX-2, p.20.

During 1994, Dr. Zacharia examined Claimant on three occasions, and reported no changes in Claimant's condition. CX-2, pp.10-14. Six months later, Claimant was seen by Dr. Zacharia on January

27, 1995; no significant findings were reported. Thereafter, Claimant did not return to Dr. Zacharia until June 15, 1998; Dr. Zacharia reported low back pain radiating into the buttocks and left thigh and diagnosed lumbar degenerative disc disease and osteoarthritis. CX-2, p.9.

Dr. Zacharia testified that he last evaluated Claimant on August 3, 2000. Tr.168. He further testified that he was Claimant's treating doctor when the October 1994 stipulations were signed and that Claimant's condition had not improved since that time. Tr.169. He stated that there has been "the usual slow deterioration of [Claimant's] degenerative disc disease; these problems do not get better. They become more or less symptomatic, depending on [Claimant's] daily activities." Tr.169. Dr. Zacharia indicated that he basically agreed with Dr. Stark's 1992 Recommendations (See page 5, *supra)*, and that Claimant should avoid those particular activities. Tr.177.

With respect to Claimant's neck injury, Dr. Zacharia testified that Claimant continues to suffer from chronic cervical sprain and mild degenerative disc disease, which is the same diagnosis he provided at the time of injury in February of 1991. Tr.170. He indicated that Claimant is still restricted from repetitive twisting and heavy lifting, and that Claimant would develop neck stiffness and pain after driving a truck on a regular basis. Tr.171. Dr. Zacharia further noted that most of Claimant's symptoms would be inflammatory in nature, so the pain symptoms of an activity may not be manifest until hours or days later. Tr.171.

Dr. Zacharia also testified about the job analysis of Claimant's pre-injury employment prepared by Employer's vocational expert, Howard Stauber. See EX-4. Dr. Zacharia opined that Claimant was physically able to perform this task; however Claimant could not do so without experiencing discomfort. Tr.174. While he described Claimant as a stoic person, Dr. Zacharia testified that Claimant's ability to handle his pre-injury employment would be determined by the amount of pain he is willing to tolerate, and that the tolerance level will coincide with Claimant's motivation to engage in that type of activity. Tr.174. Dr. Zacharia stated that he would not preclude Claimant from returning to his tractor driver position; however the requirements of this job would be problematic for Claimant: sitting for two-hour periods; twisting and climbing to enter and exit the cab; twisting of the neck to see behind the tractor; driving in inclement weather. Tr.182.

On cross-examination, Dr. Zacharia admitted that he has never seen a tractor driver on the waterfront, nor does he know the speed limit on the waterfront for these drivers. Tr.184. He also testified that he has never restricted Claimant from driving a car. Tr.184.

Dr. Joseph Bernstein

Dr. Joseph Bernstein, a board-certified orthopedic surgeon since 1962, examined Claimant on behalf of Employer on June 7, 1999. Dr. Bernstein testified that during the last five years of his practice, eighty percent of his patients had spinal problems. Tr.94. Dr. Bernstein also testified that he retired as of January 1, 2000; he stopped practicing in 1996, and ceased performing spinal evaluations as of December 1, 1999. Tr.128.

Prior to examining Claimant on June 7, 1999, Dr. Bernstein reviewed the following medical records: September 1991 MRI report; Dr. Stark's reports of November 5, 1991, August 24, 1992 and December 8, 1992; January 13, 1993 report of Claimant's cardiologist Dr. Kenneth Lehrman (CX-3, p.73); Dr. Zacharia's reports of July 28, 1993 and June 15, 1998; and the November 4, 1993 report of internist Robert Blau, M.D. Tr.94. Dr. Bernstein testified that Claimant only reported an injury to his low back, and did not disclose any information regarding an injury to his knees, left shoulder or hand. Tr.97. Claimant did report that approximately eight months before Dr. Bernstein's examination, without injury, Claimant began experiencing symptoms in his left shoulder. Tr.97. Upon examining Claimant's left shoulder, Dr. Bernstein diagnosed acute bursitis: an impingement of tendons which collectively form the rotator cuff. Tr.99. Dr. Bernstein opined that this condition may be associated with Claimant's diabetes. Tr.101.

Examination of Claimant's neck revealed a twenty-five percent loss of motion in extension and side bending, but no report of pain complaints. Dr. Bernstein attributed this loss of extension to the arthritic changes in Claimant's neck. Dr. Bernstein further opined that Claimant's ability to drive remained intact as he demonstrated a full rotation of his neck, including the movements necessary for looking over his shoulder when backing up a car. Tr.103. With respect to the intensity of Claimant's neck pain, Dr. Bernstein characterized it as modest pain as Claimant was not taking any medication for this symptom, and was not precluded from performing daily activities such as driving a car. Tr.104.

With respect to Claimant's low back, Dr. Bernstein testified that it was significant that Claimant did not experience spinal or limb pain when asked to cough while his spine was in a hyper-extended position. Dr. Bernstein explained that in hyper-extension the holes through which the nerve roots escape the spinal canal close down. Coughing significantly raises the intraspinal pressure, and therefore, if there is any compromise or compression, the coughing should reproduce leg or buttock pain. Tr.107. He also noted that Claimant's straight-leg raising resulted in some stiffness, but did not produce any back or extremity pain. Tr.108.

Dr. Bernstein also stated that the absence of knee and ankle reflexes were attributable to Claimant's recently diagnosed diabetes rather than to nerve root compression. He reasoned that if there is a disc pressing on a single nerve root, it will typically affect the one nerve causing a loss of one reflex on

one side. Moreover, there were no signs of the buttock, thigh and leg pain that typically accompanies such a significant amount of nerve loss from disc herniations. Tr.109. Dr. Bernstein also testified about the significance of Claimant's legs exhibiting the same circumference. If there is nerve compression at the L5-S1 disc, then the calf on the involved side should shrink a half inch or more. As it is extremely rare to have both calves at equal circumferences when the L5-S1 disc is involved, Dr. Bernstein concluded that this was further evidence of an absence of focal pressure on the nerve root. Tr.110.

With respect to Claimant's September 1991 MRI, Dr. Bernstein was not able to review the actual film, but did read the accompanying report dated September 25, 1991. He opined that the findings were consistent with a degenerative disorder. Tr.110. However, he disagreed with the findings of hypertrophic[6] degenerative changes in the facets with desiccation at L5-S1, with a small left paracentral protrusion and annulate fissure. Dr. Bernstein explained:

> If the protrusion is significant, it should at L5-S1, impact the S-1 nerve root and give us alternation of an ankle reflex and/or calf atrophy . . . there is not focal loss just on the left side and there is no calf atrophy. If it's a very big compression on the nerve root, then the examinee would not be able to walk on the balls of his feet and [Claimant] did, in the course of the examination, walk on his tip toes at my request.

Tr.111-112.

At trial, Dr. Bernstein expressed his belief that there was a misprint in the MRI report, and the phrase "This is *now* resulting in compression of the thecal sac," should read "this is *not* resulting . . ." Tr.112. The radiologist reported that there was no stenosis in the central or right canal. The central canal would be impacted if there was thecal sac compression. Tr.113. Furthermore, the clinical examination produced no signs of nerve root irritation or thecal sac compression as Claimant exhibited "good straight leg raising, no motor weakness, and the ability to walk on his heels and toes with good strength." Tr.115. Thus, Dr. Bernstein felt there was an error in the MRI report. Tr.115.

With respect to the level of Claimant's pain, Dr. Bernstein noted that Claimant was not taking any pain medication or wearing any back support, and was gardening and picking up things. Although Claimant needed to stand and stretch once or twice an hour, Dr. Bernstein indicated that this was consistent with Claimant's degenerative back condition. Tr.117.

Dr. Bernstein also reviewed the surveillance videos of Claimant dated May 29, 1998; May 30, 1998; June 26, 1998; and July 2, 1998. EX-6, p.33. He declared that Claimant "did a lot more bending

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[6] Hypertrophy is the enlargement or overgrowth of an organ or part due to an increase in size of its constituent cells. See *Dorland's Illustrated Medical Dictionary* 802 (28th ed. 1994).

from the waist than I would have anticipated;" however Dr. Bernstein also noted that there was nothing in the video tapes that was inconsistent with Claimant's performance during the June 1999 examination. Tr.118. Dr. Bernstein indicated that there were no references in Dr. Zacharia's examination notes of increased back pain after Claimant performed the activities recorded on the surveillance tapes. Tr.118. In concluding that Claimant had experienced a change in his medical condition from 1993, Dr. Bernstein considered the fact that Claimant was precluded from repetitive bending, repetitive light lifting and carrying in December of 1992, but then was able to perform these activities in 1998 as evidenced by the surveillance tapes. Tr.119.

With respect to Claimant's pre-injury employment, Dr. Bernstein testified that he reviewed the Job Analysis prepared by Howard Stauber, and also visited the waterfront to obtain a first-hand impression of the tractor driver position. Tr.122. Based on his observations at the docks, coupled with Mr. Stauber's job description, Dr. Bernstein opined that Claimant was able to work a full eight-hour shift as a tractor driver, assuming he had opportunities to stretch, an hour lunch and two fifteen-minute breaks. Dr. Bernstein did not find that Claimant's neck or low back condition would preclude him from returning to his pre-injury position as a tractor driver. Tr. 123.

On cross-examination, Dr. Bernstein acknowledged that he did not examine Claimant at the time the parties entered into stipulations in 1994, and in fact, only examined Claimant on one occasion. Tr.126. Dr. Bernstein testified that he did not discuss the surveillance videos with Claimant because he believed it might have led to a confrontational situation. Tr.131. He further noted that he did not discuss the job analysis or the requirements of the tractor driver position with Claimant. Tr.140. When asked whether Dr. Stark's 1992 Recommendations are applicable to Claimant's current condition, Dr. Bernstein declared that the limitations on heavy lifting, pushing and pulling were accurate; however Claimant was now capable of repetitive bending, light lifting and sitting for intervals of twenty to thirty minutes. Tr.151.

Vocational Evidence

Howard Stauber, a certified vocational consultant and rehabilitation counselor, testified for Employer regarding the Job Analysis he prepared and his observations of the tractor/bomb cart[7] driver position ("tractor driver position"). Mr. Stauber has been doing job analyses for approximately seventeen years. In 1985, he began conducting job analyses of the tractor driver position; his most recent

[7] Mr. Stauber explained that the bomb cart is similar to a tractor; however the cart has a more cushioned receptacle due to its edges being raised which allows the container to be placed inside the extended edges. As a result, no bumping occurs when the container is loaded onto the cart and no hoses have to be connected. Tr.216-217.

observations of this job occurred on May 18, 2000. Tr.186; EX-3, p.11. Mr. Stauber testified that he has driven a tractor himself, and has spoken to dozens of tractor drivers and foremen supervisors about this position. Tr.188.

Mr. Stauber remarked that since the mid-1990's the tractor driver position has changed. He identified three aspects of the tractor driver position that have undergone significant improvement: the quality of the vehicles/tractors; the condition of the terminals; and the training of the workers upon whom the tractor driver relies. Tr.188. The first area of change Mr. Stauber discussed was the seating. He explained that the comfort level has greatly increased due to an "air ride" system that provides a softer ride and back support, and adjustable seats that allow the driver more leg room. Tr.190. Other notable improvements include: shock absorbers, side-mirrors, heaters in the cabs, and power steering.

Mr. Stauber testified that within the last five years of observing this position, he has never seen a tractor without side mirrors. Tr.190. He further stated that a majority of the tractor drivers utilize their mirrors when backing up a vehicle. Tr.191.

The condition of the terminals and areas where the tractors are driven has also improved. Mr. Stauber explained that terminal surfaces have been paved repeatedly over the last six years, and that ruts and potholes have been filled so that they are hardly visible. Tr.194. He also noted that while rail-tracks are still present, the holes in the surrounding areas have been paved which makes traveling over the tracks much smoother. Tr.195. Mr. Stauber testified that these improvements were evident in the six terminals he visited within the past year. Tr.195.

He also stated that the training of workers upon whom the tractor driver relies has improved. Mr. Stauber noted that better training for this type of personnel creates a safer and smoother work environment for the tractor driver. Tr.188.

Finally, Mr. Stauber testified about the sitting required by the position:

> [S]itting in a cab varies anywhere from an hour to less, and by far the majority of drivers sit well less than an hour before they take some break, and by that, I mean a break to get out to attach hoses, a break that is part of their contract as a tractor driver under the Local 10 guidelines.

Tr.191-192.

Mr. Stauber explained that two hours of driving for a tractor driver does not mean two hours of

actual driving without a break; during this two-hour period there will be occasions for the driver to get out of his cab to adjust equipment or to wait in line for a container. Tr.194. He further noted that most drivers exit the cab through a third door located in the rear of the cab which leads out to a platform and allows the driver to adjust hoses without having to step down to the ground. Tr. 194.

With respect to the physical requirements of the job, Mr. Stauber indicated that there was nominal lifting; no repetitive bending or stooping; light pushing and pulling to connect the hoses; occasional climbing to enter and exit the cab; however by using the rear door the driver only has a one and a half step up and the assistance of a handle bar located on the side of the door. Tr.197.

Mr. Stauber also addressed Claimant's concerns about the frequency and intensity of the jarring and bouncing by stating that today these occurrences are more momentary and instantaneous. Tr.197. As the equipment has improved, the impact of the bumping has diminished.

When asked to compare a tractor to a private vehicle, Mr. Stauber reported that several longshoremen have commented that the seating in their tractors is "far superior" to that which they experience in their own ordinary pick-up trucks. Tr.199. He also noted that terminal driving is quite different from freeway driving in that the posted speed limits in the terminals average between ten and fifteen miles per hour. Tr.199.

Mr. Stauber testified that the frequency of the tractors/bomb carts moving beneath the crane over the past five years has decreased due to the increase in tractor drivers in the terminals. As a result, there has been a longer line of trucks waiting to go under the crane, and therefore the drivers complete fewer moves[8] per hour. Tr.200. Based upon his conversations with Local 10 Secretary Joleta Lewis, Mr. Stauber stated that there are plenty of tractor driver positions available on the waterfront. Tr.201.

On cross-examination, Mr. Stauber indicated that his 1995 job analysis of the tractor driver position was not prepared specifically for Claimant. He also admitted that he did not know the location of Claimant's pre-injury employment. Tr.202.

Surveillance Evidence

Employer submitted into evidence videotapes of surveillance and surveillance logs of Claimant's activities dated May 29, 1998, June 26, 1998, July 2, 1998, October 22, 1998, October 23, 1998,

[8] Mr. Stauber explained that a "move" involves the placement or removal of a container from the chassis of the vehicle. Tr.193.

November 24, 1998, November 25, 1998, December 9, 1998 and December 10, 1998. EX-7; EX-8.[9] The videotapes reveal Claimant engaging in various physical activities over a six-month period. Claimant acknowledged that he was the person shown in the videotapes; he admitted to cutting limbs off of a tree, placing limbs on the ground and sawing them into pieces, climbing a ladder, and bending over to place the limbs in his pick-up truck. Tr.24. However, Claimant remarked that the surveillance tapes do not fully reflect the events being depicted, as they do not show when Claimant was having problems completing these tasks or needed to rest. Tr.33.

The May 29, 1998 videotape of Claimant shows him climbing a 15-foot ladder, looking up at the tree, and then sawing a branch from the tree. Claimant appears to be sawing without restriction, but taking breaks periodically. Once the limb is dislodged from the tree, Claimant kneels down next to the fallen limb and begins sawing the branch into smaller pieces. Then, Claimant approaches his pick-up truck, and leans over the bed of the truck. The investigative logs report that this videotape reveals 36 minutes of Claimant performing various physical activities.

On June 26, 1998, Claimant was observed bending over and pulling weeds from the lawn, and then hosing down the walkway leading to his house. During one segment of the video, Claimant is seen repetitively bending at the waist pulling weeds for almost two minutes. Later, Claimant is seen placing tree branches into a receptacle, and pushing the branches further into the container. The investigative logs document one hour and nine minutes of Claimant's activities. On July 2, 1998, Claimant was seen walking around his yard without restriction, and turning his neck freely in all directions.

On October 22, 1998, Claimant was observed exiting his pick-up truck, and walking into a medical center. Approximately two hours later, Claimant is seen walking out of the medical center and entering his truck without any apparent difficulty. The November 24, 1998 videotape shows Claimant bending at the waist to lift up two empty recycling containers with his right hand, and then placing them besides his neighbor's house. A few hours later, Claimant is taking groceries out of the trunk of his wife's car and carrying them into the house.

The December 10, 1998 videotape shows Claimant entering his pick-up truck , driving to Sears' department store. After twenty minutes, Claimant emerges from the store carrying a small white bag; he then enters his vehicle and returns to his home. A few hours later, Claimant is seen driving to Home Depot. Claimant appears to be in the store for approximately 33 minutes. Claimant is seen leaving Home Depot, pushing a large shopping cart holding several items. After pushing the cart approximately 40 yards,

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[9] At trial, the parties stipulated that Employer's Exhibits 7 and 8, the investigative log and video tapes, would be admitted without the foundational requirements. Tr.8.

Claimant was observed lifting the items from the cart and placing them into the bed of his truck. He appears to have no difficulty handling these items, which range from one to four feet in length.

ANALYSIS

Section 22 of the Act, 33 U.S.C. § 922, is the only means for changing otherwise final decisions. Section 22 states, in pertinent part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . . and . . . issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation award, or award compensation.

33 U.S.C. § 922.

Modification is permitted based on a mistake of fact in the initial decision or where a claimant's physical or economic condition has changed. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291 (1995); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 171 (1988). Modification based on a change in condition may be granted where a claimant's physical or economic condition has improved or deteriorated following entry of a compensation award. *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). Moreover, a change in economic condition need not be "substantial" in order to warrant Section 22 modification. See *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992). The party requesting modification has the burden of proof in showing a change in condition. See *Vasquez v. Continental Maritime*, 23 BRBS 428 (1980).

Based on a thorough review of the evidence of record, the Court concludes that Employer has carried its burden to show that Claimant's physical condition has improved, and that the changes in Claimant's pre-injury employment have made the position compatible with his current physical restrictions.

Prior Stipulations

Claimant contends that modification is not appropriate because the parties had previously stipulated that Claimant was permanently and partially disabled from returning to his pre-injury employment.

While Section 22 modification is unavailable to alter settlements approved pursuant to Section 8(i),

an award based on the parties' stipulations is subject to modification if the requirements of Section 22 are met. See *Lucas v. Louisiana Ins. Guaranty Assoc.*, 28 BRBS 1 (1994). The compensation order issued by the Director was based on stipulations; it is not a Section 8(i) settlement. Thus, the award is subject to modification if the requirements of Section 22 are satisfied.

Change in Physical Condition

Employer argues that Claimant's physical condition has improved, and therefore, Claimant is capable of returning to his pre-injury employment. Employer relies on the opinion of its medical expert, Dr. Joseph Bernstein, as well as the testimony of Claimant's physician, Dr. Alan Zacharia, that he would not restrict Claimant from returning to his pre-injury employment.

Claimant contends that his physical condition has not improved, but rather continues to deteriorate due to Claimant's degenerative disc disease, and additional health problems.[10] Claimant also notes that Dr. Zacharia testified that it would be "imprudent" for Claimant to go back to his tractor driver position.

The undersigned finds that Employer has satisfied its burden to show that there has been a change in Claimant's physical condition. The Court credits the opinion of Dr. Bernstein over that of Dr. Zacharia. Although Dr. Zacharia is considered Claimant's treating doctor, he only conducted four examinations of Claimant between July 1994 and January 27, 1999.[11] Claimant did return to Dr. Zacharia on a more regular basis in 1999 and 2000; however the Court notes that this increase in medical treatment also coincided with Employer's petition for modification.

Assuming arguendo that Dr. Zacharia is Claimant's treating physician, a treating doctor's opinion is not necessarily conclusive regarding a claimant's physical condition or the extent of his disability. See *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989); *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998)("special weight" standard limited to treating doctor's opinion regarding treatment). Moreover, the court may reject the opinion of a treating physician which conflicts with the opinion of an examining physician, if the decision sets forth "specific, legitimate reasons for doing so that are based on substantial evidence in the record." *Magallanes*, 881 F.2d at 751. As Dr. Bernstein's conclusion is based on his clinical findings from the 1999 examination, Claimant's medical records and MRI report, and surveillance videos, the undersigned finds this opinion well-reasoned and more persuasive than Dr.

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[10] Claimant's medical history includes: two angioplasties, three angiograms, diabetes, and pulmonary function problems. See CX-5. However, Claimant has not presented any evidence regarding the effects of these conditions on his ability to return to his pre-injury employment.

[11] On October 19, 1994, the parties' stipulations were approved and Employer filed its petition for modification on January 27, 1999.

Zacharia's. Furthermore, the Court notes several deficiencies in Dr. Zacharia's analysis. Dr. Zacharia's opinion relies heavily on Claimant's unsupported representations of his symptoms, is equivocal with respect to Claimant's ability to return to his pre-injury employment, is not substantiated by the objective findings, and is derived from an inadequate understanding of the tractor driver position.

Dr. Zacharia's reliance on Claimant's recitation of symptoms is misplaced as the Court does not consider Claimant to be a credible witness. Clamant offered inconsistent and evasive testimony, and failed to fully disclose information during examinations. When Claimant was asked why his son could not have performed some of the tasks Claimant was observed doing on the surveillance tapes, he explained that his son had broken his hand, finger, or fingers; however Claimant could not recall exactly when this injury occurred. Tr.42. Claimant also testified that he could not return to his pre-injury employment because he could not tolerate the bending and twisting of the position; however the videotapes capture Claimant repetitively bending from the waist to pick up weeds, climbing ladders, and twisting and bending to enter and exit his vehicle. EX-7, pp.41-55. Moreover, Claimant was vague and ambiguous when questioned about the frequency of his visits with Dr. Zacharia between 1994 and 1998:

> Q: After you signed the stipulations [in 1994], did you go for a long period when you didn't see him [Dr. Zacharia]?
>
> A: I don't think so, but your saying I did. I'm not positive.
>
> . . . .
>
> Q: What's your recollection of the frequency that you saw him [Dr. Zacharia] after the stipulations?
>
> A: I think after I seen (sic) him I've had, I've seen him a couple of times and I also had a couple - didn't see him, I went to have an epidural. So, I think I've had three of those.

Tr.21.

Claimant also testified that the surveillance videos did not accurately portray Claimant's situation as they failed to show when he was rubbing his back or needed to take a break. However, Claimant conceded that he did not tell Dr. Zacharia that his back was aggravated by the activities Claimant was shown performing on the videos (Tr.25), nor did Claimant disclose these activities when discussing the cause of his neck pain with Dr. Bernstein. Tr.103.

Dr. Zacharia's testimony is also equivocal about Claimant's ability to return to his pre-injury employment. Although he testified that Dr. Stark's 1992 Recommendations are still applicable to Claimant's orthopedic condition, Dr. Zacharia also stated that Claimant was physically capable of handling the tractor driver job, but could not "accomplish it without being very uncomfortable." Tr.174. Dr. Zacharia explained that Claimant's ability to handle this position would be determined by the amount of pain Claimant is willing to tolerate, and that level of tolerance will coincide with Claimant's motivation to engage

in that type of activity. Tr.174. He remarked that "We're talking mostly about discomfort and pain . . . . I can't tell [patients] whether to tolerate it or if the job is worth it to them. . . . That's up to him, but he will be symptomatic after he does it." Tr.174. Dr. Zacharia's approach is not a reliable indicator of Claimant's ability to return to his pre-injury employment. Claimant has already expressed his dissatisfaction with the tractor driver position by testifying that "[I] mean it was a job that I tried to avoid as much as possible . . . . I didn't like the job." Tr.85. Based on Claimant's distaste for the position, it is evident that he is not highly motivated to withstand the discomfort associated with this job. Although Claimant asserts that he is incapable of handling the duties of a tractor driver, he has demonstrated his willingness to tolerate pain for activities such as weeding, gardening, driving and climbing. Claimant testified that the activities captured in the surveillance tapes did bother him, but he "kept doing them anyhow." Thus, the Court declines to follow Dr. Zacharia's opinion that Claimant must ultimately decide whether he can return to his pre-injury employment.

Furthermore, Dr. Zacharia's opinion is not consistent with the objective findings. Dr. Zacharia testified that Claimant's neck condition prevents him from repetitive twisting and severe positioning, and therefore, he would not recommend that Claimant drive a truck on a regular basis. Tr.171. However, Dr. Zacharia does not provide any clinical findings such as loss of motion in extension or rotation to support his conclusions. This is a significant omission considering that Dr. Bernstein reported that Claimant demonstrated full rotation of his neck without pain complaints, including the movements necessary for backing up a car. Tr.103. Dr. Bernstein further testified that there was nothing in the surveillance videos which revealed a loss of function of the neck, and stated that "[Claimant] moved the neck appropriately in association with the activities demonstrated." Tr.103. He also noted that Claimant's neck condition did not inhibit his ability to drive. Tr.102.

Last, Dr. Zacharia does not possess a strong understanding of Claimant's pre-injury position. Dr. Zacharia acknowledged that he has never seen a tractor driver on the waterfront, nor does he know the current condition of the terminals. Tr.183. He testified that Claimant's low back condition could not tolerate the two-hour sitting requirement of the job. However, Employer's vocational expert, Mr. Stauber, explained that two hours of driving for a tractor driver does not mean two hours of actual driving without a break; there will be occasions for the driver to get out of his cab to adjust his equipment or to wait in line for a container. Tr.194. Mr. Stauber also addressed Dr. Zacharia's concern over the amount of climbing required: most drivers exit the cab through a third door located in the rear of the cab which leads to the platform and allows the driver to adjust the hoses without having to step down to the ground. Tr.194. Dr. Zacharia also noted that Claimant's condition would be aggravated by the bumping and jarring caused by the rugged terminal surfaces. Mr. Stauber testified that terminal surfaces have been paved repeatedly over the last six years, and that potholes have been filled so that they are hardly visible. Tr.194. In sum, the undersigned finds that Dr. Zacharia's opinion is based on Claimant's unsubstantiated representations, is equivocal, lacks supporting objective evidence, and relies on an inadequate understanding of Claimant's

pre-injury position.

In contrast, Dr. Bernstein's opinion is persuasive. Although the June 1999 examination was his only occasion to evaluate Claimant, Dr. Bernstein did review several of Claimant's medical records including: the September1991 MRI report, Dr. Stark's 1992 Work Restrictions, and Dr. Zacharia's July 1993 and November 1993 reports.[12] Moreover, Dr. Bernstein reviewed the surveillance tapes, and observed first-hand the demands of the tractor driver position on the waterfront. His conclusions are well-reasoned and supported by the evidence.

With respect to Claimant's low back, Dr. Bernstein relied on several objective findings to discredit Dr. Zacharia's diagnosis of disc herniation at L5-S1. Dr. Bernstein opined that if there was herniation it should be accompanied by nerve root compression or thecal sac compression. However, this was not the case as Claimant exhibited "good straight leg raising, no motor weakness, and the ability to walk on his heels and toes with good strength." Tr.115. This lack of compression was further evidenced by Claimant's ability to cough while in the hyper-extended position without experiencing spinal or limb pain. Dr. Bernstein explained that in hyper-extension the holes through which the nerve roots escape the spinal canal close down. Since coughing significantly raises intraspinal pressure, if there is any compression, the coughing should reproduce leg or buttock pain. Tr.107. He also noted that the lack of atrophy in Claimant's legs was significant because it is extremely rare to have both calves at equal circumferences when the L5-S1 disc is involved. Last, Dr. Bernstein dispelled the absence of both knee and ankle reflexes as evidence of nerve root compression by referring to the lack of objective evidence (loss of one reflex on one side), and subjective symptoms (buttock, leg and thigh pain), which typically accompanies significant nerve loss from disc herniation. Tr.109.

Dr. Bernstein did remark that the 1991 MRI report revealed Claimant's degenerative disc disease to be "a little bit advanced" for his age. However, he also noted that this was not conclusive proof that Claimant was experiencing significant pain as Claimant was performing daily activities such as gardening and weeding, without the assistance of pain medication[13] or back support. Tr.117. Moreover, Dr. Bernstein convincingly testified that there was an error in the MRI report's finding of thecal sac compression. Dr. Bernstein reasoned that if there was compression, the MRI report would have indicated that the central canal was impacted; however the radiologist's report stated "central, right canal, no stenosis." Tr.113. He further noted that the clinical findings did not support the conclusion of thecal sac compression as there was no motor weakness or inability of Claimant to walk on his toes with good strength. Tr.115.

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[12] See page 8, *supra*.

[13] Dr. Bernstein did indicate that Claimant was taking Motrin which is an anti-inflammatory medication with some pain relieving effects. Tr.117.

According to Dr. Bernstein, there has been a change in Claimant's condition which warrants his return pre-injury employment. Dr. Bernstein stated that Claimant's ability to bend repeatedly in a brief period of time, as demonstrated in the surveillance videos, coupled with the fact that Claimant was incapable of performing this activity in 1993, would constitute a change in Claimant's condition. Tr.119. He also noted that the video's depiction of Claimant engaged in repetitive light lifting "constitutes a change compared to what was represented in 1993." Tr.120.

In addition, Dr. Bernstein testified that "there was nothing with reference to [Claimant's] spine[14] that would keep him from performing the job of tractor driver." Tr.120,123. He indicated that this assessment was based on the Job Analysis, as well as his visit to the waterfront. Dr. Bernstein opined that Claimant could handle the sitting requirements of the tractor driver job as he would have opportunities to alternate between sitting and standing. Tr.122. He further declared that Claimant requires only to "stretch out for a moment or two," which he could accomplish by stepping out onto the platform, thus avoiding the need to step down to the ground. Tr.123.

Dr. Bernstein also dismissed Claimant's contention that his left shoulder condition prevents him from returning to his pre-injury employment. Dr. Bernstein noted that Claimant's left shoulder problems did not become manifest until eight months before his 1999 examination, without injury; that there was no atrophy; no acute findings. Tr.124. Dr. Bernstein diagnosed acute bursitis, and concluded that this condition may be associated with Claimant's diabetes. Tr.101. He opined that Claimant's shoulder condition was "immediately treatable" and would not inhibit Claimant from returning to the tractor driver position. Tr.120.

In conclusion, Employer has established that there has been a change in Claimant's physical condition based upon the testimony of its medical expert, Dr. Bernstein, as well as the videotapes showing Claimant performing activities that he was deemed incapable of doing at the time the parties entered into stipulations in 1994.

Change in Economic Condition Through Improvement in Pre-Injury Position

Employer also argues that the preponderance of evidence shows a change in Claimant's pre-injury employment which makes the position suitable for Claimant's physical restrictions. Employer relies on the opinion of its vocational expert, Mr. Stauber, as well as the testimony of examining physician, Dr. Bernstein.

Claimant contends that despite the changes in the tractor driver position, his economic condition has not improved as he is still unable to perform the duties of his pre-injury employment.

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[14] Dr. Bernstein's reference to "spine" includes the low back and neck. Tr.123.

Claimant further argues that his physical condition cannot withstand the demands of this position, namely the prolonged sitting, twisting, jarring and bouncing. Tr.65.

Mr. Stauber testified that since the mid-1990's, the tractor driver position has experienced the modernization of its equipment, terminal conditions, and employee training. Tr.188. The Court finds that Mr. Stauber's analysis accurately and thoroughly describes the recent improvements in the tractor driver job. Claimant challenges the reliability of the Job Analysis based on the fact that Mr. Stauber never met with Claimant, nor did he specifically prepare this report for Claimant's case. However, Mr. Stauber's analysis stems from his fifteen years of experience in analyzing the tractor driver position, during which time he has logged over forty-five hours of observation, conducted approximately sixty interviews with tractor driver personnel, had several opportunities to ride in the tractors, and made countless visits to several terminals along the San Francisco and Oakland waterfront. Tr.186, 206. In contrast, Claimant's testimony is based on his experience as a tractor driver almost eleven years ago: Claimant has not been to the terminals for the past few years. In addition, Dr. Zacharia admitted that he has never been to the waterfront to observe the tractor driver job, and therefore, his opinion was based on Claimant's description of the position. Thus, the Court deems credible Mr. Stauber's opinion that the tractor driver position has experienced significant improvement since Claimant was last employed in this position in 1991.

Claimant also contends that despite the improvements noted in the Job Analysis, his physical condition cannot withstand the jarring, bouncing, and twisting associated with this job. However, Dr. Bernstein opined that Claimant's condition does not preclude him from driving a tractor as he is able to drive his own automobile and pick-up truck. Tr.134. Despite Claimant's contention that driving over rugged terminal surfaces would aggravate his condition, the Court agrees that the improvements in the vehicles and terminal conditions allow him to return to his pre-injury position. Mr. Stauber testified that the comfort level in the seating has greatly increased with the addition of an "air-ride" system,[15] shock absorbers and power steering. Tr.189. As illustration, several longshoremen have reported that the seating in their tractors is "far superior" to that which they experience in their personal pick-up trucks. Tr.199. The Court finds that these changes are compatible with Claimant's current condition since he has not demonstrated any problems driving his own pick-up truck, and Dr. Zacharia has not restricted Claimant from driving. Furthermore, Claimant's concerns about terminal conditions are nullified by Mr. Stauber's testimony that the surfaces have been paved repeatedly over the last six years, which has made the driving much smoother.

Next, Claimant argues that he cannot tolerate the two-hour sitting requirement of this position. As previously mentioned, two hours of driving for a tractor driver does not entail two hours of actual driving.

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[15] An "air-ride" system provides a softer ride, more back support, and adjustable seats. Tr.189.

Mr. Stauber testified that there are several opportunities for Claimant to stretch and walk during this two-hour period. He remarked that the increase in the number of tractor drivers in the past five years has resulted in fewer moves[16] under the crane for each tractor, and longer waiting periods. Similar findings were reported by Dr. Bernstein, who conducted a four-hour observation of this position at Marine Terminals. He also noted that the drivers were waiting in long lines, and that this would be sufficient time for Claimant to stretch and alternate positions.

In conclusion, the undersigned finds that Employer has satisfied its burden to show that Claimant's pre-injury employment is compatible with his current physical restrictions. The changes in the equipment, technology, and terminal conditions since Claimant was last employed as a tractor driver have sufficiently advanced so that they no longer prevent Claimant from returning to this position.

Conclusion

Employer has sustained its burden to show that Claimant's physical condition has improved based upon the testimony of its medical expert, Dr. Bernstein, as well as the surveillance videos showing Claimant performing activities that he was deemed incapable of doing at the time the parties entered into stipulations in 1994.

Employer has proven by the preponderance of evidence that the changes in Claimant's pre-injury employment have made this position compatible with his current physical restrictions.

Accordingly, the Court finds that Claimant is no longer disabled, and therefore, physically capable of returning to his pre-injury employment.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, the Court issues the following Order:

1. Employer's Petition for Modification is granted.

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[16] See page 12, *supra.*

2. Claimant's entitlement to permanent partial disability benefits is terminated as of the effective date of this Order.

IT IS SO ORDERED.

ANNE BEYTIN TORKINGTON
Administrative Law Judge

San Francisco, California
ABT:jrh